REMARKS

Status of the Claims

After entry of the amendments, Applicants have amended claims to method claims. Support for the claim amendments can be located throughout the specification as well as in the original claims. Accordingly, no prohibited new matter is believed to have been introduced in to the application. Applicants reserve the right to file a continuation or divisional application on any subject matter canceled by way of amendment.

Response to the Restriction Requirement

The Office restricted claims 1-35 in to one of the following groups:

Group I, claims 1-19, and 29-32, drawn to a composition containing arachidonic acid and/or a compound with arachidonic acid as a constituent fatty acid; or

Group II, claims 20-28, and 33, drawn to a food composition containing arachidonic acid and/or a compound with arachidonic acid as a constituent fatty acid and a method of making such a composition; or

Group III, claim 34, drawn to a method for marketing a composition with effects of decline prevention, improvement or enhancement of normal responses of cognitive abilities of a healthy person.

Additionally, Applicants were requested to elect between the species of (a) absence or (b) presence of docosahexanoic acid and/or a compound with docosahexanoic acid as a constituent fatty acid in the event either Group I or Group II was elected.

Applicants elect Group I ***with traverse*** (*i.e.*, claims 1-19, and 29-32). Because Applicants have elected Group I, Applicants further elect ***with traverse*** the species of a triglyceride containing arachidonic acid as part or all of the constituent fatty acid. Claims 1-19 and 29-32 read upon the elected species.

Applicants traverse the restriction and election for the following reasons. First, the Office failed to group all the claims and thus the restriction is ***incomplete***. Claim 35 was omitted from the Office's consideration. Applicants request reconsideration and grouping of claim 35 with the Office's next communication.

Second, unity of invention was found during the examination of the parent PCT application. Applicants further note that unity was found after consideration of U.S. Patent No. 6,080,787 [hereinafter the '787 patent] as indicated in the International Search Report. The Office has an increased hurdle over that of "serious burden" to overcome when unity is found during international examination. This hurdle of why there is a serious burden given the findings of the International Search Authority ***unaddressed.*** Applicants note that Anthony Caputa has pointed out that if the inventions now being restricted were searched and examined together in either the current application or a parent (which it was in the PCT application), it will be difficult to justify the burden. *See* T. Caputa, page 6, TC1600 Restriction Training Materials (August 2004). Yet, in this instance, burden went completely unaddressed. The failure to address burden, let alone assessing serious burden, indicates a defective argument for requiring a restriction. The restriction is therefore defective.

Fourth, the Office requires a species election. ***No species election can be required on a national stage application.*** Thus, the species election between the presence or absence of docosahexanoic acid as a constituent fatty acid is improper, because any species election is improper. It must be withdrawn. Applicants direct the Office's attention to M.P.E.P. § 1850 B. Markush Practice. Applicants also point out that it is unclear as to which group the species election applies, because this is unaddressed in the Office Action.

Applicants further assert that a species election cannot be required under the Patent Cooperation Treaty (PCT) Articles, Rules, or Administrative Instructions. Applicants further direct the Office to the decision in *Caterpillar Tractor Co. v. Commissioner of Patents and Trademarks*, 231 U.S.P.Q. 590 (E.D. Va. 1986). In *Caterpillar Tractor*, the Court held that the treaty provisions under the PCT trump those of the U.S. Patent and Trademark Office under a conflict of laws analysis. Under Article 27 of the PCT, "no national law shall require compliance with requirements relating to the form or contents of the international application different from or additional to those which are provided for in this Treaty and Regulations."

Caterpillar Tractor, 231 U.S.P.Q. at 590-591. By instituting the species election, the Office is instituting a requirement different from and in addition to the requirements set forth by the PCT. This is not permitted. The election should be withdrawn and all elements of the claim considered together.

Accordingly, Applicants request that the species election be withdrawn and the claims considered in their entirety.

For all of the above reasons, the restriction requirement should be reconsidered and withdrawn. Additionally, the species election should be reconsidered and withdrawn.

For all the above reasons, the restriction of the groups should be reconsidered and withdrawn.

CONCLUSION

If there are any other fees due in connection with this filing, please charge the fees to our Deposit Account No. 50-0573. If a fee is required for an extension of time under 37 C.F.R. § 1.136 not accounted for above, such an extension is requested and the fee should also be charged to our Deposit Account.

Respectfully submitted,
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